Law of the Sea: Expression of Solidarity

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The Third United Nations Conference on the Law of the Sea (UNCLOS III), by experimentally realizing consensus, has served as a medium for transcultural negotiation of meaning. Even if it produces no treaty or merely legitimates the division of most of the oceans, the Conference will nevertheless have renewed our hope for the expression of human solidarity and a correspondent commonality of the seas.

INTRODUCTION

The ocean has always stood for other realities; it exerts a hold upon our imagination for, as Augustine observed, the sea is the figure "of the surgings and restlessness of human life."[1] The law of the sea shares this figurative quality. As first stated in its modern form by Hugo Grotius, a legal regime of freedom of the seas reflects the natural order according to which the oceans and the winds, by providing one nation with access to another, are the "bond of human fellowship."[2] A new law of the sea is replacing the Grotian order in a world that has replaced the world of Grotius. I propose that some elements of the new regime may be

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My gallant colleague professor, Louis Sohn, did me the collegial kindness of reading and commenting on a larger manuscript of which this article is a part. He is due my hearty thanks, but he is not to be blamed for any error, weakness, or outrage in what I have written.

1. AUGUSTINE, THE CITY OF GOD, bk. XX, pt. 16 at 735 (M. Dods transl. 1950).
2. H. GROTIUS, THE FREEDOM OF THE SEAS 8 (R. Magoffin transl. 1916).

made to serve, as did some from the old, the bond of human fellowship.

TRANSCULTURAL COMMUNICATION

Grotius' world was relatively intimate. Diplomats and books travelled freely, if slowly, across the channel. There was a *lingua franca*. When Grotius made a point on the continent, it was scored in England. Communication in the contemporary world is more difficult. We may live in an electronic global village in which information travels instantly, but understanding is rendered more problematic; words have to bridge cultures.

In a book on metaphor, George Lakoff and Mark Johnson note that different cultures have different conceptual systems so that human realities vary from one culture to another.[3] Genuine communication among people who do not share the same culture is especially difficult. Understanding becomes possible, they say, only through the negotiation of meaning: "you slowly figure out what you have in common, what it is safe to talk about, how you can communicate unshared experience or create a shared vision"; they add that, with "enough flexibility in bending your world view and with luck and skill and charity, you may achieve some mutual understanding."[4]

It is hard enough to achieve understanding through the negotiation of meaning between representatives of two cultures. Complexities are compounded in geometric progression as all the nations on earth are added in. Just to establish contact requires some doing. Grotius did not have to be concerned about being read. Today, absent a proper patron or access to the electronic media, a writer like Grotius and his potential public might never get together. If they did, they would still face the need to negotiate meaning. While it was easy for Grotius' pamphleteering to find a responsive audience, one of the present essentials is an appropriate surrounding, a forum. Absent a forum, a studied means for communication, there can be little better than random, reverberant speech in a place of discourse. Thus, the United Nations may provide settings for the negotiation of meaning. Certainly the United Nations Conference on the Law of the Sea (UNCLOS) has been a medium for the shared attempt to create a shared regime for the sea.

Lakoff and Johnson make a casual observation that, brought to bear on UNCLOS, may help to explain how the negotiations have

3. G. LAKOFF & M. JOHNSON, METAPHORS WE LIVE BY, 231-32 (1980).
4. *Id.*

cohered so long in spite of the centrifugal forces at work. They note that each culture has a different conceptual system so that human aspects of reality will differ from culture to culture. But they go on to observe that cultures do have physical contexts, "some of them radically different—jungles, deserts, islands, tundra, mountains, cities, etc. In each case there is a physical environment that we interact with, more or less successfully. The conceptual systems of various cultures partly depend on the physical environments they have developed in."[5] The sea, next to sun and air, is the most widely shared, uniform aspect of the physical environment. I wonder whether the conceptual systems of diverse cultures ought not to have the greatest convergence—or least divergence—along the front of interaction with the common factor of the sea. If so, perhaps international, multicultural negotiations regarding the sea may thus enjoy some natural, cohesive predisposition to the possibility of mutual understanding. It may also then prove possible that negotiations revolving around the sea may constitute a further, common basis for attempts at mutual understanding on other subjects. In any event, I think it well worth noting the singular shape taken by the conference.

Estimates of the probability of the Conference's success or failure have focused on its potential for bringing out an acceptable work product, a treaty. A just treaty is surely a prize worthy of the aspiring. However, my point is that even a complete failure in extruding a convention would not compromise the significance of the event itself as a dramatic event of law. More than longevity distinguishes it from a brief, shining moment of Camelot; it has been a productive laboratory, working experiments in the forms of negotiation, multinational decisions, and transcultural discourse. The Conference itself promises more than any documental outcome for the prospects of a bond of human fellowship.

CONSENSUS

The most striking characteristic of the Conference is that it has proceeded by consensus. The text has been assembled without a vote. Consensus is of recent vintage in international bodies and has been gaining in favor.[6] As an alternative to majority rule, it

5. *Id.* at 146.
6. *See, e.g.*, F. CHAI, CONSULTATION AND CONSENSUS IN THE SECURITY COUNCIL,

has commended itself especially to the minority of big powers, now that more than 150 nations, each with one vote, participate in balloting.

The United Nations committee which prepared the way for UNCLOS III itself functioned on the basis of consensus. Its report to the General Assembly then proposed for UNCLOS III a "Gentleman's Agreement"[7] that the "Conference should make every effort to reach substantive matters by way of consensus and there should be no voting on such matters until all efforts at consensus have been exhausted."[8] The Gentleman's Agreement was adopted by the United Nations General Assembly and then by the Conference and appended to the Conference rules of procedure.[9]

The rules of procedure set out the workings of consensus. Rule 39 provides for matters of substance at the Conference to be decided by a two-thirds majority; Rule 37, however, states that, before a matter of substance is put to the vote, it shall be determined "that all efforts at reaching general agreement have been exhausted. . . ."[10] And prior to making such a determination, there are to be deferments, including a ten-day, cooling-off period during which every effort is to be made to achieve general agreement. UNCLOS III has abided by this Gentleman's Agreement through its years and has functioned on the basis of consensus.[11]

As practiced by this Conference, consensus has arisen from the investment of time; development of familiarity among the delegates; deft, patient leadership; flexible and floating negotiating groups; formal and informal committee meetings; inter-sessional

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UNITAR (1971); Jenks, *Unanimity, the Veto, Weighted Voting, Special and Simple Majorities and Consensus as Modes of Decision in International Organizations*, in CAMBRIDGE ESSAYS IN INTERNATIONAL LAW, ESSAYS IN HONOR OF LORD MCNAIR, 48 (1965); Sohn, *Voting Procedures in United Nations Conferences for the Codification of International Law*, 69 AM. J. INT'L L. 310 (1975); Sohn, *United Nations Decision Making: Confrontation or Consensus?* 15 HARV. INT'L L.J. 438 (1974).

7. On the subject of these instruments generally, see Lauterpacht, *Gentlemen's Agreements*, in INTERNATIONAL LAW AND ECONOMIC ORDER 381 (Flume et al. eds. 1977).

8. The statement was approved by the U.N. General Assembly on November 16, 1973, and then adopted by the Conference along with the rules of procedure at Caracas on June 27, 1974. *See*, Sohn, *Voting Procedures in United Nations Conferences for the Codification of International Law*, 69 AM. J. INT'L L. 310, 333-51 (1975); Stevenson & Oxman, *The Third United Nations Conference on the Law of the Sea: The 1974 Caracas Session*, 69 AM. J. INT'L L. 1, 3-5 (1975); Vignes, *Will the Third Conference on the Law of the Sea Work According to the Consensus Rule?* 69 AM. J. INT'L L. 119 (1975).

9. Third U.N. Conference on the Law of the Sea, Rules of Procedure, Appendix, U.N. Doc. A/CONF.62/30/Rev.2 (1976).

10. *Id.* Rules 39, 37.

11. *But see* Oxman, *The Third United Nations Conference on the Law of the Sea: The Seventh Session (1978)*, 73 AM. J. INT'L L. 1, 2-3 (1979) (vote on a non-treaty issue, a resolution confirming president's continuation in office).

communication; and the kinds of fruitful chance encounters made possible by convening in a genial, compact environment like that of Geneva. Above all, consensus has depended upon a kind of willing suspension of disbelief, the exploratory, mutual trust and good faith of those who believe arguments may count.

Clearly, consensus is vulnerable in many spots, as UNCLOS III has demonstrated. It is subject to manipulation: cynical maneuvering by forces removed from the conference table or the bad faith of a representative sitting at it can undo the whole. It is subject to self-absorption: delegates can become their own clientele, or professional conference boosters, or the inner circle of an exclusive elite whose outer circle is a coterie of dependent, knowing academic commentators. Consensus is also subject to oppression: dissent by the powerless can be suppressed on the pretext of wrapping up a "package deal," while dissent by the powerful can be a handily exercised veto.[12] Moreover, it is subject to diversionary uses: a gradual process that occupies attention in Geneva is good cover both for land producers to control the mineral market as long as possible and for a powerful industry to prevent action until deep seabed mining technology is developed and ready for unilateral deployment.

One of the perceived weaknesses of consensus seems to constitute one of its strengths. A conference which operates on the basis of consensus does not result in precise, determinative legal texts. To achieve agreement, its products like its meetings are open-ended. This is a strength because it is an invitation to more of the same, a solicitation to continue the process, to keep a conversation going, to broaden and attract support. As has been pointed out, the process of codifying the law is being displaced by the process of developing and designing law for new international realities, justice, and equity; and this displacement means that the maximum possible support must be sought.[13]

Notwithstanding its vulnerability, as it has become possible, consensus has become necessary in consequence of a constella-

12. As a corollary, there may be an inherent bias in favor of insiders, generally the big powers, inasmuch as consensus rewards the party whose text or proposal enjoys the initial provisional success. The proponent of change has the burden of gathering a consensus against the status quo. This effect has been ameliorated by the fact that the consensus texts were prepared by the officers of the Conference, all of whom came from small countries.

13. Sohn, *Voting Procedures in United Nations Conferences for the Codification of International Law*, *supra* note 6, at 353.

tion of developments: increasing interdependence among nations, adoption of democratic practices in formal international processes, and the coming of age of parliamentary diplomacy.[14] But consensus owes its existence mostly to that contemporary phenomenon whereby huge military force has grown unimaginably fearsome in direct proportion to the increasing political impotence of those who wield it. This irony for the large nations has become evident at the same time that effective means have become available to small nations for expressing their own ideological unity in dissent. Thus it has become "necessary in any discussion of international law—which itself is designed to persuade the reader and not to force him to accept a position—to assume equality of states before the law and genuine reciprocity."[15] Consensus is the form assumed by negotiations among those who are equal and whose equality is expressed in the willingness to persuade and be persuaded by each other.

Not surprisingly, because it has been the mode of decision-making followed by UNCLOS III, consensus has been projected into the future as a mode of decision-making for the Conference's progeny. The text provides that an amendment Conference, should one be called in the future, is to proceed by consensus.[16] The UNCLOS text also provides for the proposed Council of the International Sea-Bed Authority to decide certain reserved and critical questions only by consensus.[17]

For the purposes of the Council's decisions, the text defines "consensus" with deceptive simplicity. It is "the absence of any formal objection."[18] Heretofore it has been thought that consensus was undefinable, maybe one of its most endearing qualities. What follows the text's concise definition, and elaborates on its mechanics, is more revealing of the elusive subtleties entailed:

> Within 14 days of the submission of a proposal to the Council the President shall ascertain whether there would be an objection to the proposal if it were put to the Council for adoption. If the President of the Council ascertains that there would be an objection to a proposal before the Council, he shall constitute a Conciliation Committee consisting of not more than nine members, with himself as Chairman, for the purpose of reconciling the differences and producing a proposal which can be adopted by consensus. The President shall establish the said committee within three days following such ascertainment. The Conciliation Committee shall work ex-

14. On the subject of parliamentary diplomacy see Jessup, *Parliamentary Diplomacy: An Examination of the Rules of Procedure of Organs of the United Nations*, 89 RECUEIL DES COURS 181 (1956) (Jessup notes that the term "parliamentary diplomacy" was first suggested by Dean Rusk).

15. D'Amato, *On Consensus*, 8 CAN. Y.B. INT'L L. 104, 117 (1970).

16. Draft Convention of the Law of the Sea, U.N. Doc. A/CONF.62/L.78, art. 312(2), Annex 6 (art. 42) (Aug. 28, 1981).

17. *Id.* art. 161(7)(D).

18. Draft Convention, *supra* note 16, art. 161(7)(e).

> peditiously and report to the Council within 14 days. If the Conciliation Committee is unable to recommend a proposal which can be adopted by consensus it shall, in its report, set out the grounds on which a proposal is being opposed.[19]

The last sentence of the quoted passage indicates the animating guidance of consensus in complex multicultural negotiation on highly-charged, political-economic subjects. If a consensus proposal cannot be found, the grounds of the objection are to be published, held up to general public scrutiny. The immediate pressure for reaching consensus is exposure. That is all. The sole measure in the Council's repertory for preventing a failure of consensus is the prospect of having one's objection brought into the open. An objection will either be legitimate and have purchase among the international public or it will not. If not, it will presumably draw the censure of the audience. That is to say that the prospects for consensus are impelled by nothing more than the force which backed Grotius' *Mare Liberum*, i.e. the power of persuasion.

Consensus is mandated for the Council in one other instance which raises the issue of the role of experts in the making of decisions. The use of experts has posed interesting questions for international law, particularly in the context of environmental concerns.[20] The UNCLOS III text provides for drawing on experts in several circumstances. In one case, a coastal nation "taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation."[21]

Scientific experts are also to have a role in determining the limits of the continental shelf. According to the 1958 Convention, a nation's continental shelf extends to the 200 meter isobath *or* the limits of exploitability.[22] The latter standard was altogether too troublesomely vague. The UNCLOS text generally provides that the continental shelf shall extend to the "outer edge of the conti-

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19. *Id.*

20. *See, e.g.*, Contini & Sand, *Methods to Expedite Environment Protection: International Ecostandards*, 66 AM. J. INT'L L. 37 (1972); Schachter & Serwer, *Marine Pollution Problems and Remedies*, 65 AM. J. INT'L L. 84 (1971).

21. Draft Convention, *supra* note 16, art. 61(2).

22. Convention on the Continental Shelf, art. 1, *done* April 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311 (effective June 10, 1964).

nental margin. . . ."[23] If a continental shelf clearly drops to the abyssal plain within the 200-mile limit of the economic zone, then there is no problem.[24] But what of a continental shelf beyond 200 miles? Would it not then encroach upon the deep seabed? The determination of where the continental margin lies, beyond 200 miles, is both important and not obvious.[25] Accordingly, the text provides that, in these circumstances, experts shall be brought into the reckoning.[26] The coastal nation shall mark its limits "on the basis of" recommendations made by a proposed Commission on the Limits of the Continental Shelf to be composed of experts in geology, geophysics or hydrography.[27]

The most interesting UNCLOS referral to experts is a provision that links experts and consensus and relates to plans of work for a deep seabed mining. A nation-sponsored party wishing to mine nodules must submit a plan of work, a contract, which meets a variety of specifications spelled out in the text.[28] The plan of work is first reviewed by the experts of the fifteen-member Legal and Technical Commission. The Commission then makes its recommendation for approval or disapproval to the Council. Whether a contract is to be entered into and an applicant allowed to mine depends upon the following provision for consensus governing the Council's decision:

> (i) If the Commission recommends the approval of a plan of work, it shall be deemed to have been approved by the Council if no Council member submits to the President within 14 days a specific written objection alleging non-compliance with the [applicable] requirements. . . .In the event that there is an objection, the conciliation procedure [which I have quoted above] shall apply. If, at the end of the conciliation process, the objection to the approval of the plan of work is still maintained, the plan of work shall be deemed to have been approved by the Council unless the Council disapproves it by consensus among its members excluding the State or States, if any, making the application or sponsoring the applicant;
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> (ii) If the Commission recommends the disapproval of a plan of work or does not make a recommendation, the Council may decide to approve the plan of work by a three-fourths majority. . . .[29]

In effect, this provision for consensus heavily weights the Legal and Technical Commission's recommendation for approval. The assumption is that a contract that satisfies the technicalities in

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23. Draft Convention, *supra* note 16, art. 76(1).

24. The complete provision on the continental shelf states, "or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance." *Id.*

25. *See id.* art. 76(4).

26. *Id.* art. 76(8); *id.* Annex II.

27. *Id.* Annex II, art. 2.

28. *See id.* Annex III.

29. *Id.* art. 162(j).

the (presumably objective) judgment of the experts should proceed unless there is considerable opposition; an opponent would have to meet the high standard of assembling a consensus against it.

The immediate purpose of the provision is to allay the fears of prospective operators who might think that their plans of work would be subject to disapproval on non-technical, purely political grounds. It is of particular interest because of its solution to the problem of the interplay of experts and political judgment. It gives priority to expert judgment but keeps this judgment within the ultimately political context allowed by consensus.

Undeniably, decisions regarding the sea and its resources have been improved by utilizing advances made possible by the sciences, both the hard sciences like biology and the quasi-theological sciences like economics. The management of fisheries, for example, has benefited from scientific improvements. UNCLOS III, however, has made clear the fact that the sea is ultimately a political issue. That is, decisions regarding the sea are not for experts only, be they experts in science, law or diplomacy. There is no critical mass of facts that will make decisions for us; judgments are necessary, and the final judgments are political. This is not to say that fact and expert are to be excluded. Not at all. Experts cannot make our decisions for us but can improve the decisions which it is for us to make. The Draft Convention deploys consensus so as to allow both expert and political judgment.

It is understandable that UNCLOS proposes that these and other critical decisions be made by consensus. Consensus has been observed by this Conference and commends itself to the future. However, consensus is not the only standard proposed. Depending upon the subject matter, Council decisions are also to be taken by votes ranging from a simple majority to two-thirds to three-fourths.[30] And substantive votes of the Assembly are to be determined by a double majority, i.e. two-thirds of those "present and voting" provided that such a majority includes a majority of those "participating in that session of the Assembly."[31] None of these instances represents the abandonment of consensus; consensus still forms the core. The system of voting by tiered majori-

30. *Id.* art. 161(7).
31. *Id.* art. 159(6).

ties is a way of maintaining the core by allowing less rigorous modalities for matters of less importance or less controversy.

A Conciliation Method

The projection of consensus into the future would allow for a kind of Conference on the law of the sea in continuous session. This afterlife of the Conference would also be supported in a further way. I have noted that consensus does not produce determinative, precise legal texts. Certainly this has been true in the present instance. The Draft Convention, in an attempt to achieve agreement, has been left open-ended in many respects. One of the reasons for the care lavished on the decisional structure for proposed future organizations is that they will have jurisdiction over questions unresolved by this Conference.

If the Conference finally produces a recommended convention and so takes a sabbatical from negotiation, it will necessarily leave a text that is generative of the need for further multilateral negotiation and decision-making in the ways that I have outlined. Such a text will also generate problems whose solution involves only two or a few nations and not all. Negotiations involving many nations would not be called for. The drawing of a marine boundary line between two nations is an example. For the judicial resolution of such controversies, the UNCLOS text proposes the Law of the Sea Tribunal with its Sea-Bed Disputes Chamber.[32] Nations have traditionally been reluctant to submit disputes to third-party processes, especially the judicial process. Among the prominent reasons for this reluctance is the preference of nations, invoking their sovereignty, for unilateral determinations.

Not the least intriguing aspect of the UNCLOS recommendations are those for pre-judicial, or non-judicial, dispute settlement. The text brings almost all disputes within the possibility of conciliation. Practically, conciliation is less formal, less time-consuming and less costly than judicial or arbitral proceedings.[33] Conceptually, conciliation is the complement to consensus. It depends

32. *Id.* Annex VI. *See generally, e.g.*, Adede, *Settlement of Disputes Arising Under the Law of the Sea Convention*, 69 Am. J. Int'l L. 798 (1975); Adede, *Law of the Sea—The Integration of the System of Settlement of Disputes Under the Draft Convention as a Whole*, 75 Am. J. Int'l L. 84 (1978); Sohn, *Settlement of Disputes Arising out of the Law of the Sea*, 12 San Diego L. Rev. 495 (1975); Sohn, *Settlement of International Disputes Relating to Deep Sea-Bed Mining*, in Festschrift für Rudolf Bindschedler (1980). Comment, *Settlement of Fisheries Disputes in the Exclusive Economic Zone*, 73 Am. J. Int'l L. 89 (1979).

33. *See* Sohn, The Role of Conciliation in International Disputes, The Fine Print, May 1, 1981, at 3.

upon the same underlying mutual trust and good faith, the same willing suspension of disbelief, brought down from the level of multi-lateral negotiation to a concrete dispute among a limited number. Conciliation is the most consensual method for settlement of the limited disputes left over by a consensually achieved, imprecise text.

Most disputes are to be settled either by voluntary conciliation or, failing the use or success of conciliation, by judicial or arbitral procedures entailing binding decisions.[34] The disputes excepted from compulsory binding decisions are among the thorniest: certain aspects of scientific research and fishing by one party in the economic zone of another nation; and the boundaries between nations of the territorial sea, exclusive economic zone or continental shelf. In these instances, compulsory conciliation may be invoked by any party to the dispute, and the other party or parties must join in submitting the dispute to a conciliation commission.[35] The conciliation commission is to report its findings of fact and law and "such recommendations as [it] may deem appropriate for an amicable settlement of the dispute."[36] But the commission's report "shall *not* be binding upon the parties."[37] As with the success of consensus, so with the success of conciliation: it depends upon the power of persuasion and the willingness to be persuaded.

CONCLUSION

The international law of the sea began with a papally-sanctioned Spanish-Portugese allotment of the whole.[38] These claims, challenged by Grotius and the dispersion of naval power, yielded to a regime of undivided seas.[39] It was not until the Truman-sanctioned modern assault on the freedom of the seas that the Grotian regime gave way.[40] The acquisitive rush to dominion seems re-

34. *See*, Draft Convention, *supra* note 16, pt. XV.
35. *Id.* arts. 297-98.
36. *Id.* Annex V, art. 7(1).
37. *Id.* art. 7(2) (emphasis added).
38. F. DAVENPORT, EUROPEAN TREATIES BEARING ON THE HISTORY OF THE UNITED STATES TO 1648, at 156-63, 71-83 [papal bull.], 86-100 [tordecillas], (1967).
39. *See, e.g.*, T. FULTON, THE SOVEREIGNTY OF THE SEA 4-5 (1911).
40. *See* Presidental Proclamation No. 2667, 3 C.F.R. 67 (1943-48 Comp.), *reprinted in* 59 Stat. 884 (1945). *See generally* E. WHITEMAN, INTERNATIONAL LAW 740-931 (1965); Hollick, *U.S. Oceans Policy: The Truman Proclamations*, 17 VA. J. INT'L L. 23 (1976).

cently to have abated but only after most of the marine store of wealth had been divided among the claimants.

Selden had argued that instruments could be found for distinguishing the dominions of the seas.[41] He meant the instruments of geographers. He could not have imagined the possibility, now seriously raised, that husbandry of fish can be effected by confining them within marine zones marked off by electric currents. Such electric "fences" are a parable of how far the enclosure movement has carried.[42] Law has figured in this movement as a contrivance serving division and defense—a protection of exclusive franchises for exploitation.

The Third United Nations Conference on the Law of the Sea may have presided over and authorized the final stages of the closing of the seas. But such formal ceremonies have not been its sole occupation. It has also substantively acknowledged the commonality of the seas by supplying the common heritage with specific content. More importantly, in my view, it has experimentally realized consensus.

The Conference may be sabotaged by a corporate failure of will or by one of the participating nations (the United States is the likeliest saboteur). Or its documental results may come to nothing. Nevertheless, it renews hope for the human solidarity and the correspondent commonality of the seas exhibited in Grotius' appeal respecting the bond of fellowship. When a single bulb has been made to burn, however briefly or dimly, the possibility of electric light has been demonstrated. The Conference has proven the possibility for accomodating mutual trust, good faith and proleptic belief in the efficacy of argument.[43] Even if only prelimina-

41. J. SELDEN, OF THE DOMINION, OR, OWNERSHIP OF THE SEA, [book I. chap. 22] 140-41 (1972) [bk. I, chap. 22].

42. *See* F. CHRISTY & A. SCOTT, THE COMMON WEALTH IN OCEAN FISHERIES 96-97, 101-02 (1965).

43. In his book, SHARING THE WORLD'S RESOURCES, Oscar Schachter discusses standards for the equitable sharing of resources and presents a possibility for understanding the appropriation of ocean resources as a response to demands for equity. This possibility might mean that even the division of the seas could be construed in alignment with the kind of human solidarity and commonality I am pursuing. Schachter points out that recognition of equity and distributive justice among nations is attributable "not to a sudden spread of altruism, but to a widely felt necessity on the part of governmental elites to respond to tensions and grievances which threaten the equilibrium and stability of the international order." O. SCHACHTER, SHARING THE WORLD'S RESOURCES 16 (1977). *See id.* at 143-44.

Schachter's book seems to be a more complete reading than that of Louis Henkin, who believes that what has emerged from UNCLOS III has been "at bottom. . .the result of 'political vectors,'" drawn elsewhere than at the Conference. L. HENKIN, HOW NATIONS BEHAVE 215 (1979). The law of the sea, he says, will relfect "egoistic nationalist forces of coastal states" on the one hand, and, on the other, the fallout from a struggle between the Third World, hard driving its New

rily, the Conference has been a means for impressive multicultural discourse.

International Economic Order, and wealthy developed nations favored by the established system. *Id.* at 226-27.

Note should also be taken of the illuminating study by Keohane & Nye, *Power and Interdependence*, in which the law of the sea is demonstrated as a paradigmatic reflection of growing international interdependence, which is distinct from "solidarity" or "commonality." Keohane and Nye point out that an order of interdependence does not necessarily imply an order of greater equity and justice, since interdependence can lead to the exploitation by the powerful of the weaker who are dependent upon them. Where solidarity is recognized, however, exploitation will not follow.

It is also incumbent upon me to acknowledge indebtedness and to pay tribute to the seminal work of M. MCDOUGAL & W. BURKE, THE PUBLIC ORDER OF THE OCEANS (1964). McDougal and Burke view international law as a policy-oriented, political process of authoritative decision. They have successfully brought attention to the horizontal process of interaction among nations by which they implement and clarify their common interest. McDougal and Burke have argued that common interest would seem inescapably to lie in "an accommodation of exclusive and inclusive claims which will produce the largest total output of community values at the least cost." BURKE & MCDOUGAL, *Id.* at 52. The inherited old order of the oceans, they thought, had successfully accommodated the inclusive interests of all States and the exclusive interests of coastal nations so that it did not simply balance competing interests but also clarified and secured common interests. Professor McDougal later stated: "With strong preferences for the protection of common and rejection of special interests and for a balancing in favor of inclusive rather than exclusive interests, I confess that I may appear. . .a pleader for lost causes." McDougal, *The Law of the High Seas in Time of Peace*, 25 NAVAL WAR COLL. REV. No. 3, at 35, 36 (1973). He went on to prophesy about the UNCLOS that "given the arrogant contemporary perspectives of nationalism and misperceptions of common interest, disaster may impend." *Id.* at 44.

My own approach is to be distinguished from that of McDougal and Burke in several fundamental respects, including the fact that I think the accommodation of claims is not an adequate substitute for the negotiation of meaning and that interest, even common interest, is not an adequate alternative to solidarity. Perhaps the chief differentiating factor, however, is simply that they wrote when, not so long ago, it could still be said that the immensity of the oceans allowed nations to "seek their own ends by freely chosen strategies, largely without reference to the choices made by others." BURKE & MCDOUGAL, *supra*, at 25. Although I write less than two decades later, it has become a different epoch. If UNCLOS does legitimate the division of most of the ocean, who is to say that this will have been too great a price for the performance it has given us of solidarity in the medium of law.